

IN THE COURT OF APPEALS OF IOWA

No. 0-472 / 10-0186

Filed July 28, 2010

IN RE THE MARRIAGE OF TRANG NHA NGUYEN-WEAR AND LUCAS ALAN WEAR

Upon the Petition of

TRANG NHA NGUYEN-WEAR,
n/k/a TRANG NHA NGUYEN,
Petitioner-Appellee,

And Concerning

LUCAS ALAN WEAR,
Respondent-Appellant.

Appeal from the Iowa District Court for Dallas County, Gary G. Kimes,
Judge.

Lucas Wear appeals the portion of the district court's modification order
requiring him to pay \$20,000 in attorney fees. **AFFIRMED.**

David J. Hellstern of Kreamer Law Firm, P.C., West Des Moines, for
appellant.

Jon Garner & J.D. Hartung of Hartung & Schroeder, L.L.P., Des Moines,
for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Tabor, JJ.

TABOR, J.

Lucas Wear appeals the portion of the district court's modification order requiring him to pay \$20,000 in attorney fees to his ex-wife, Trang Nha Nguyen (Mimi). We affirm the district court's award of attorney fees to Mimi and also award her attorney fees for this appeal.

Background Facts. Lucas and Mimi were married in March 2005. Their marriage was dissolved by decree in October 2008. The decree reflected the parties' agreement to joint legal custody and shared care of their minor son. The decree also provided that a move by either parent of more than fifteen miles outside of Des Moines would constitute a "substantial change in circumstances" requiring modification of the shared care arrangement.

On March 4, 2009, Lucas applied for modification of the decree based on his move to Pittsburgh, Pennsylvania, to pursue his master of business administration (MBA) degree at Carnegie Mellon University. Mimi remained in Iowa where she worked for Principal Financial Group, earning an annual salary of \$56,637. During a three-day modification trial, both parents presented evidence in support of their requests for physical care of their son. Mimi also asked for Lucas to contribute to her attorney fees, citing his superior ability to pay the costs of the modification action brought on by his move out of state.

The evidence showed that Lucas could afford to leave his position at Wells Fargo Home Mortgage, where he earned \$53,000 annually, thanks to a family trust valued between two and five million dollars. Lucas expected to earn approximately \$105,000 per year after completing his MBA program, with a

signing bonus of as much as \$20,000. The trust provided Lucas with living expenses of \$4000 per month when he started his graduate degree. Lucas also accessed funds from the trust to purchase nine airline tickets for his son to facilitate a proposed visitation schedule. Lucas testified that if he was granted physical care of his son, his family would allow withdrawals from the trust to pay his son's kindergarten tuition costs of approximately \$14,000 per year at a private school in Pittsburgh. The family trust also committed to paying Lucas's costs incurred in litigating the modification action, including attorney fees and travel costs for his witnesses.

Mimi offered as an exhibit an e-mail she received from Lucas a few months before the trial. In the e-mail, he offered to pay all costs associated with their property settlement transaction if she would agree to their son attending school in Pittsburgh. Lucas explained the deal would save Mimi \$8205.50 (her half of the payoff deficiency) "plus whatever further legal fees and court costs that would be incurred resulting from the trial, which could be upwards of \$20,000." Lucas acknowledged at trial that the \$16,411 to pay off the deficiency would have come from the family trust.

The district court granted Mimi physical care of their son and directed Lucas to pay \$615.66 per month in child support. The court calculated the support amount by using the net monthly income of \$3283.73, which Lucas earned before quitting his job to return to school. In addition, the district court ordered Lucas to pay Mimi "the sum of \$20,000 as and for attorney's fees as well as the costs of this action." The district court noted on the record that Lucas was

“a very fortunate person to have access to a family trust” The court cited Lucas’s e-mail in which he anticipated Mimi’s attorney fees would run “upwards of \$20,000.”

Lucas asked the court to reconsider its award of attorney fees and costs, noting that he was a full-time student and that he “was borrowing money from his late grandmother’s trust to pay his living expenses” while he sought his MBA. The district court denied the motion. Lucas appeals from the award of attorney fees, arguing that the district court misjudged his ability to pay and set the fees at an unreasonable amount.

Discussion. Iowa Code section 598.36 (2009) governs the award of attorney fees in a modification proceeding. The provision states, in such a proceeding, “the court *may* award attorney fees to the prevailing party in an amount deemed reasonable by the court.” Iowa Code § 598.36 (emphasis added). Section 598.36 gives the district court considerable discretion in deciding whether to award such fees. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). We will not disturb an attorney fee award absent a finding of abuse of discretion. *Id.* The district court should make an attorney fee award which is fair and reasonable in light of the parties’ respective financial positions. *In re Marriage of Grady-Woods*, 577 N.W.2d 851, 854 (Iowa Ct. App. 1998).

Lucas contends the district court abused its discretion because the \$20,000 fee award surpasses his ability to pay. He characterizes his use of the trust money for living expenses while pursuing his MBA as a loan which will have

to be repaid to the trust after graduation.¹ He claims there is “no guarantee” he will become a beneficiary of the trust “in the relatively near future.” Lucas asserts he has no current ability to pay and should not be obligated to borrow money to pay Mimi’s attorney fees. We disagree with this assertion.

The trial record revealed that Lucas was not reluctant to tap into the family trust for his own purposes. He used it for his living expenses in Pennsylvania and to finance his modification action in Iowa. As the district court found, Lucas “may have more discretionary income now” than when he was employed. The trial court was not restricted to considering Lucas’s current income in determining his ability to pay Mimi’s attorney fees. See *Maier*, 596 N.W.2d at 568 (looking to litigant’s assets with her current husband in determining ability to pay). The court did not abuse its discretion by considering Lucas’s ready access to the family trust fund when deciding to award attorney fees to Mimi.

Lucas also contests the amount of attorney fees the district court awarded to Mimi, arguing that \$20,000 was unreasonable in comparison to other awards in modification cases. The fee amounts awarded in prior cases have little precedential value because we must base our decision primarily on the circumstances of the parties presently before us. See *In re Marriage of Erickson*, 491 N.W.2d 799, 801 (Iowa Ct. App. 1992). Under the instant circumstances, an award of \$20,000 in attorney fees was reasonable. The physical care issue was hotly contested; both parents called numerous witnesses to attest to their

¹ At trial, Lucas testified the money he received from the trust in the present would be offset against what he would inherit in the future. In other words, it was “a loan from [himself.]”

parenting abilities and the testimony stretched over three days. Lucas spent trust funds to bring his witnesses from Pittsburgh to Iowa for the trial. Further, Lucas fully expected Mimi's attorney fees to reach \$20,000 as evidenced by his e-mail. The district court did not abuse its discretion in awarding that amount.

Finally, Mimi asks us to award her attorney fees on appeal. In addressing her request, we consider her financial needs, Lucas's ability to pay, and the relative merits of parties' positions on appeal. See *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). While Mimi has a steady income, Lucas enjoys an uncommon financial freedom due to his family's sizeable trust and his earning capacity once he completes his MBA. Based on the significant variance in the parties' abilities to pay and the lack of merit in Lucas's appellate challenge, we order that Lucas pay Mimi's appellate attorney fees.

Conclusion.

We affirm the district court's order requiring Lucas to pay \$20,000 in attorney fees to Mimi for the trial and also require him to pay the fees incurred for her representation on appeal.

AFFIRMED.